IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 217 of 1997
IN
SPECIAL CIVIL APPLICATION No. 1621 of 1984
WITH
CIVIL APPLICATION NO. 5917 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AHMEDABAD COOP DEPTT STORES LTD.
Versus
UNION OF INDIA & Another.

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Appearance :
M/S TRIVEDI & GUPTA for the Appellant.
NOTICE SERVED for Respondent No.1.
Mr. NIRAL R MEHTA for Respondent 2.

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CORAM : HONOURABLE MR.JUSTICE A. L. DAVE

and

HONOURABLE MR.JUSTICE S. D.DAVE

Date : 24/10/2007

ORAL JUDGMENT:- (Per : A. L. DAVE, J.)

1. This Letters Patent Appeal arises out of a judgment and order passed on 2.9.1996 in Special Civil Application No.1621 of 1984. The petitioner-appellant is a co-operative society registered under the provisions of the Gujarat Co-operative Societies Act, 1961. The petition was preferred to challenge the order passed by Regional Provident Fund Commissioner, Gujarat State, Ahmedabad, on 8th November, 1983, holding that the employees engaged by the counter-holders in capacity as licensees in the premises of the petitioner-appellant represent the petitioner-appellant and fall in the categories of employees as defined under Section 2(f) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as “the Act”).

1.1 The petitioner-appellant runs 'Apna Bazar', a departmental store, wherein different persons are allotted counters as licensees and there is an agreement in this regard between the petitioner-appellant on one hand and such counter-holders on the other. The respondents treated the employees working on such counters as the employees of the petitioner-appellant and issued notice requiring them to comply with the provisions of the Act.

1.2 The case of the petitioner-appellant is that such persons working on the counter were not the employees of the petitioner as

defined under Section 2(f) of the Act and, as such, the petitioner could not be held to be principal employer of those workmen and no contribution can be asked to be made by the petitioner.

1.3 The case of the petitioner-appellant did not find favour with the learned Single Judge and the petition came to be dismissed by the judgment and order impugned herein. Learned Single Judge observed that the petitioner-appellant had control over the employees working on the counter and that the counter-holders were being paid commission by the petitioner as per the draft of the agreement produced before him, although actual agreements between the stalls/counter-holders and the petitioner were neither placed before the Provident Fund authorities or before the learned Single Judge. It was also considered that the petitioner never contended that the persons working at the counters were not engaged in the work or in connection with the work of the petitioner and the learned Judge was, therefore, of the view that no interference was called for with the order of the respondent authorities.

2. We have heard learned Advocate, Mr. Naik, for M/s Trivedi & Gupta for the petitioner and learned Advocate, Mr. Mehta, for the respondent.

3. Mr. Naik submitted that the learned Single Judge erred in holding that commission was paid by the petitioner to the counter-holders. In fact, it is the other way way round. The counter-holders, under the agreement, were required to deposit

their daily collection with the petitioner and the petitioner, after deducting its commission, would return the remaining amount to the counter-holders. Mr. Naik also contended that the goods at the counters did not belong to the petitioner-appellant. It was also contended that the control of the staff was only for maintaining the reputation of the store run by the appellant and there was total absence of relationship of employer and employee between the appellant and the persons working on the counter engaged by the counter-holders. He, therefore, submitted that the order passed by the learned Single Judge and by the respondent authority may be set aside.

4. On the other hand, learned Advocate, Mr. Mehta, contended that this appeal itself is not maintainable under Clause 15 of the Letters Patent as the order passed by the learned Single Judge was in exercise of powers under Article 227 of the Constitution.

4.1 Mr. Mehta submitted that the petitioner-appellant has control over the working of the stores and its employees. He has drawn our attention to clause (3) of the Agreement, where it is stated that the counter is given on leave and licence basis for management and the counter-holder will not engage more than two persons to run the counter. The names of such persons will have to be got approved from the petitioner-appellant and no other person will be permitted to attend such counters. Mr. Mehta, therefore, contended that there is total control of management of the stalls by the petitioner-appellant and, therefore, the persons working at the

counters would be, in fact, the employees of the petitioner-appellant. He submitted that the respondent was justified in holding that the persons working at the counters were, in fact, employees of the petitioner-appellant and the petitioner-appellant was required to contribute towards Provident Fund of such persons as required under the Act. He also submitted that the learned Single Judge, by a reasoned judgment and order, dismissed the petition and no interference in the judgment and order is called for. He submitted that the appeal may, therefore, be dismissed.

5. Considering rival side contentions, we first propose to deal with the question of maintainability of the appeal. It is true that, in paragraph 3, the learned Single Judge has referred to Article 227 of the Constitution, but, if we see the petition, the cause title indicates that it was a petition under Article 226 of the Constitution and the prayers also were for issuance of a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the respondents to treat the order as cancelled. Differently put, even a writ of certiorari was sought, though not spelt out in terms. As per the settled proposition of law, we, therefore, cannot say that this was a petition purely under Article 227 of the Constitution, argued as such and dealt with as such by the learned Single Judge, so as to exclude the right of Letters Patent Appeal under Clause 15 of the Letters Patent. We, therefore, turn down the contention of the respondent on maintainability.

6. Now, examining the merits, we find that, undisputedly,

the petitioner-appellant is a co-operative society which runs a departmental store by allotting counters on leave and licence basis and, for that purpose, a leave and licence agreement is also entered into, a model draft of which is at Annexure-A to the petition. It is nobody's case that any other type of contract was entered into between the counter-holders and the petitioner. The entire proceedings are founded on this model-draft of agreement/contract.

6.1 For supporting the order, emphasis is laid on clauses (3), (10) and (11) of that agreement.

6.1.1 Clause (3) provides that the counter-holder, who is allotted counter on leave and licence basis for management, will not engage more than two persons to work at the counter. Names of such persons will have to be got approved from the petitioner-appellant and no other person would be engaged to run the counter. The view is, therefore, taken that the petitioner is enjoying control on engagement and employment of such persons.

6.1.2 Clause (10) provides that the bill book and stationery would be provided by the petitioner-appellant and the daily collection would be deposited by the stall holder with the petitioner-appellant on day-to-day basis. It was, therefore, interpreted to mean that the petitioner enjoyed financial control over the business done at the counters.

6.1.3 Clause (11) provides that from the collection amount

deposited with the petitioner, the petitioner will deduct its commission and pay the remainder to the stall-holder after verifying the accounts and the petitioner-appellant will have the right to change the rate of commission.

6.2 The problem appears to have arisen here when the learned Single Judge has interpreted these clauses to mean that "it appears to be a case where the counter-holders were getting some commission on the sale made by them. Otherwise, if it would not have been the case as given out by the petitioner-appellant, then what for the conditions of issuance of bill on the bill book of the establishment, issuance of advertisement only through the establishment and crediting the stall proceeds in the accounts of the establishment were imposed. In our considered view, clause (11) does not provide for grant of any commission to the counter-holders. On the contrary, the petitioner-appellant was getting commission over the sale proceeds by way of or in lieu of or as licence fees and, therefore, the learned Single Judge erred in taking a support from the fact that the counter-holders were getting commission on the sale made by them.

6.3 So far as control on selection of employees, restriction on advertisement and supply of bill book and stationery is concerned, the clauses were only aimed at maintaining control build and protect its reputation. In this regard, we may refer to decision in the case of ***Haldia Refinery Canteen Employees Union & Others v. Indian Oil Corporation Ltd. and Others, (2005) 5 SCC 51***, where Their Lordships observed that, though respondent-

management did exercise effective control over contractor of canteen on certain matters in regard to running of canteen, including selection of workmen of the canteen, such control was being exercised only to ensure that the canteen was run in an efficient manner and to provide wholesome and healthy food to the workmen of the establishment and not for any other purpose. Interestingly, in that contract, clause 4.6, which was interpreted in the aforesaid manner, runs as under:-

> *"4.6 The contractor shall be required to employ/engage only that number of employees/workers as may be specifically authorised by the owner from time to time and shall maintain complete records of such employees/workers with regard to their names, address, qualifications, experience and other required details. The owner shall have absolute right to test, interview or otherwise assess or determine skills, knowledge, proficiency, capability, etc. so as to ensure that such employees/workers are competent, qualified or otherwise suitable for efficiently and safely performing the work covered by this contract. Any employee/worker rejected, not authorised by the owner shall not be employed/engaged by the contractor on the work covered by this contract."*

6.4 We may refer to judgment in the case of ***Chintaman Rao & Another v. State of Madhya Pradesh, AIR 1958 SC 388***,

wherein Their Lordships observed that there is no reason why the test laid down by the Apex Court in the context of definition of "**workman**" under the Industrial Disputes Act, 1947 cannot be invoked or applied for ascertaining whether a person is worker under the Act.

6.5 The tests laid down for examining the question are whether, having regard to the nature of work, there was due control and supervision of the employer and whether there exists relation of master and servant and the right in the master to supervise and control the work done by the servant. Not only in the matter of directing what work the servant is to do, but also the manner in which he shall do his work. Differently put, the test is whether or not the employer had authority to control the manner or execution of the act in question.

7. If we examine the facts of the case on our hand, we find that the persons employed by the counter-holders were to be employed by the counter-holders, the work to be done by such employees was to be supervised by the counter-holders and the remuneration was also to be paid by the counter-holders and the petitioner's control was only to the extent that the name of such employees were to be got approved from the petitioner and no other person was supposed to work except whose name is approved.

7.1 The other factors which may have some bearing on the question are that the ownership of the goods kept and sold at the

counters was of the counter-holders. Damage or loss of any of the goods was not to be borne by the petitioner-appellant. On conclusion of the term of leave and licence agreement/contract, the counter-holders were at liberty to take away their goods forthwith. In our view, therefore, the above factors taken collectively would indicate that the petitioner-appellant had no control over the employees of the counter-holders either in the manner and method of work or in the nature of work. The remuneration was to be paid by the counter-holders. Whatever restrictions were imposed were only in respect of getting prior approval of the name from the petitioner-appellant; restriction of not permitting anybody else to work at the counter, and the condition of no advertisement would be floated directly regarding any goods sold at the counters but they can be floated through the petitioner-appellant. All these conditions, in our view, were imposed to maintain the reputation of the store run by the petitioner and would not reflect a relationship of employer and employee between the petitioner-appellant and the employees of the counter-holders. In our view, therefore, both the respondent authorities as well as the learned Single Judge erred in concluding that the employees working at the counters run on leave and licence basis were, in fact, the employees of the petitioner-appellant and, therefore, the petitioner-appellant was required to contribute to the Provident Fund.

8. The appeal, therefore, deserves to be allowed and the same is allowed. The judgment and order of the learned Single Judge dated 2nd September, 1996, rendered in Special Civil Application No.1621 of 1984 is set aside and the order passed by

the respondent authorities dated 8th November, 1983 is quashed and set aside. From the facts emerging on record, we hold that the petitioner-appellant is not liable to extend provident fund benefits to the employees working at the counters run on leave and licence basis. There shall be no order as to costs.

9. In view of the final disposal of the appeal, no order on Civil Application No.5917 of 1997.

10. Learned Advocate for the respondent requests for suspending the operation of this order for a period of eight weeks to enable the respondent-authorities to approach the higher forum. In view of the facts recorded by us in the judgment, we do not find any reason for suspending the operation. Hence, the request is turned down.

[A. L. DAVE, J.]

[S. D. DAVE, J.]

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